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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER 1971 TERM

No. 71-1467

In the Matter of the Application of
PATRICK J. FLYNN, JR.,

Petitioner,

For a Judgment pursuant to Article 78 of N. Y. CPLR,

—against—

THE BOARD OF EXAMINERS OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the New York Supreme Court

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Jurisdiction

Respondent challenges jurisdiction on two grounds.

1.—28 U.S.C. 1257 (3), which petitioner invokes, permits review only of "final judgments or decrees rendered by the highest court of a state *in which a decision may be had,* • • •." There was no compliance with that provision.

After the dismissal of this proceeding was unanimously affirmed by the Appellate Division of the N. Y. Supreme Court, the petitioner was entitled to appeal to the N. Y. Court of Appeals as of right if the proceeding "directly involved the construction of the constitution of the State or the United States" (N. Y. CPLR 5601 [b] 2), or, in the absence of a substantial constitutional question, to appeal by obtaining permission from either the Appellate Division or the Court of Appeals (N. Y. CPLR 5602 [a]). The petitioner appealed as of right, under CPLR 5601 (b) 2, invoking *inter alia* a constitutional ground. That appeal was dismissed on the ground that the constitutional question was not "substantial" (30 N Y 2d 587).

Petitioner had also raised non-constitutional issues here, e.g., that the administrative determination was arbitrary and capricious as a matter of state law (N. Y. CPLR 7803). A favorable determination on this state issue would have resulted in judgment in his favor without necessity of reaching any constitutional issue. After the dismissal of the "constitutional" appeal, the petitioner could have sought discretionary leave to appeal to the Court of Appeals, under CPLR 5602, to raise the non-constitutional issues. Dismissal of an appeal, improperly taken as of right, does not bar a subsequent application to the Court's discretion (CPLR 5514). See e.g. *Matter of Healy,* 8 N Y 2d 1137 (1960) and 8 N Y 2d 710 (1960); *Temple* v. *Liebmann,* 7 N Y 2d 1049 (1960) and 8 N Y 2d 709 (1960).

Where there is a further opportunity to obtain appellate review in the state courts, as, for instance, by seeking discretionary leave to appeal, an application must be made to such relief as a condition to invoking 28 U.S.C. 1257 (3). See STERN and GRESSMAN, *Supreme Court Practice*, § 3.21; *Gotthilf* v. *Sills*, 375 U. S. 79 (1963); *Southern Electric Co.* v. *Stoddard*, 269 U. S. 186 (1925); *Banks* v. *California*, 395 U. S. 768 (1969), *Cardinale* v. *Louisiana*, 394 U. S. 437, 439 (1969).

2. Jurisdiction to review state court decisions in this court is limited to the "federal questions" properly raised in the state courts. STERN and GRESSMAN, *op. cit.*, 3.25, 3.30. *Whitney* v. *California*, 274 U. S. 352, 362-363 (1926); *Wilson* v. *Cook*, 327 U. S. 474, 483-484 (1945); *Newsom* v. *Smyth*, 365 U. S. 604 (1960). None of the four "Questions Presented" (Pet., pp. 3-4) were adequately raised in the "record" in the state courts (i.e., the petition or the supporting affidavits).

Petitioner, in his petition, raised only two issues, both under state law i.e., (1) that the Board's action violated a collective bargaining agreement, and (2) that the determination was contrary to the facts and arbitrary. These were the only issues discussed in the N. Y. Supreme Court's opinion (App. B to Petition). Brief and oral arguments in the state courts are not part of the record and cannot be used to establish that a "federal question" was raised. *Lynch* v. *New York ex rel. Pierson*, 293 U. S. 52, 54 (1934).

On appeal, petitioner briefed these, and two other, contentions: (1) that the By-laws of the Board of Examiners violated Article V, section 6, of the New York Constitution, and (2) that the procedure employed violated

"due process", without indicating specifically that he was invoking the "due process" clause of the United States Constitutions. (Article I § 6 of the New York Constitution provides "No person shall be deprived of life, liberty or property without due process of law.") The Appellate Division affirmed without an opinion. Petitioner raised these arguments in a brief to the Court of Appeals. That appeal was dismissed as not raising a "substantial" constitutional question, without any other discussion.

Petitioner's Question 2 (regarding the validity of the By-Laws of the Board) was raised in the appeal briefs, but it was argued solely as a claimed violation of Article V, § 6, of the *State* Constitution. Question 3 (regarding the claim that the examination was unrelated to the position sought) was *never* raised before, either in the Record on Appeal or in the briefs.

Petitioner's Questions 1 and 4 ("due process" arguments) were raised in the state courts on appeal, but there was no specific reference to the United States Constitution as distinct from the New York Constitution. The presumption in such cases is that it is the state constitution that is invoked. *Bowe* v. *Scott*, 233 U. S. 658, 664-665 (1913); *Miller Cornwall R. Co.*, 168 U. S. 131, 134 (1897). STERN and GRESSMAN, *op. cit.* § 3.26.

Thus there would appear to be no jurisdiction to review any of the four issues now sought to be raised here. In any event, it is plain that there is no jurisdiction to review the two issues other than due process (Questions 2 and 3).

Questions Presented

At most, the two questions of "due process" are presented here:

1. In determining that petitioner's record in the school system was "unsatisfactory" to establish fitness for promotion to a supervisory position, did the Board of Examiners deny him procedural due process where (1) he was provided, at the outset, with all the materials used in the evaluation, (2) given two hearings at which he had an opportunity to respond to negative evaluations and to offer proof of positive achievements, (3) given a full statement of reasons for the Board's action, and, (4) given an opportunity to obtain review of the Board's decision in the state courts or before the N. Y. State Commissioner of Education?

2. Was the use of a panel of school principals, on assignment to the Board of Examiners, to hear petitioner's rebuttal evidence and to report and make recommendations to the Board of Examiners, unconstitutional as a denial of an impartial decision maker (allegedly because they were school principals) where there was no allegation that the panel was personally familiar with those other principals who had submitted evaluations of petitioner and where there was a subsequent full hearing before the Board of Examiners?

Statement of Facts

(1)

Petitioner, a teacher, failed two Civil Service competitive examinations, one for promotion to "Chairman of Department of English in the High Schools" and one for "Assistant to the Principal in the Junior High Schools".

The examinations consisted of several parts. Petitioner passed a written test, an oral interview, a teaching test, an English proficiency examination, but he failed each examination because of an "unsatisfactory" rating upon an appraisal of his record.

The "appraisal of record" has been used, as it was here, for over 20 years. The Board sends detailed questionnaires to the principals of every school where an applicant has been employed. The principal ("official rating officer") is directed to "appraise the applicant's demonstrated abilities with reference to probable success in the position for which he seeks a license".

Here, reports were received from Walter J. Freund, principal of Intermediate School 61-Q, where petitioner taught from September 1948 to March 1966, and from Donald J. Ryan, principal of William Cullen Bryant High School, where petitioner taught from September 1966 till March 7, 1968 (the date of the rating). The principals were asked to compare the applicant with others on the same level and judge him with respect to 14 specific qualities or traits, on a scale of 1 to 5, (5—Superior, 4—good, 3—satisfactory, 2—not quite satisfactory, 1—deficient). If they felt they did "not have the information necessary to record a rating," they could decline to do so. Wherever a rating was below "3", the rating officer was required to substantiate that rating with supporting evidence. (Resp. Exhs. 1 and 7).

Mr. Freund rated petitioner "satisfactory" on five of the fourteen personal and professional qualities or traits, "not quite satisfactory" as to six, and "deficient" as to three. Mr. Ryan rated him "good" as to three, "satisfactory" as to seven, and "not quite satisfactory" as to four.

Both principals, similarly and independently, gave petitioner poor ratings in "Demonstrated ability to win and hold the respect of adults [co-workers, parents, etc.]"; tactfulness and resourcefulness in difficult situations; and, in "demonstrated ability in human relations". Mr. Freund described him as "disruptive in dealing with adults; tactless" and Mr. Ryan wrote: "Applicant in his dealings with his colleagues has not to date won sufficient respect for his professional views when he has offered them, for example, at departmental meetings", and "has not consistently displayed tact in difficult situations" or "ability in human relationship consistent with the position to which he aspires."

As to "Contribution to school's educational program (curriculum developments, preparation of instructional material, etc.)," both rated petitioner as "not quite satisfactory". Mr. Freund wrote that applicant "does not participate in developing instructional ideas or materials for school," and "is emotional and capricious in judgments, particularly when they involve adverse criticism". Mr. Ryan noted: "Applicant's colleagues do not view him as a leader. His interest in professional matters has not been sufficiently positive to qualify him for the position to which he aspires."

Both principals indicated that their ratings were based on personal knowledge, official records, and upon information received from other persons. Mr. Ryan consulted with Milton Nowak, the Chairman of applicant's department, and Mr. Freund with Ross S. Wolff, an Assistant Principal.

Mr. Ryan submitted five memoranda from the applicant's file. Three, based on classroom visits to applicant's class, make essentially negative observations. One memo notes

that applicant does not encourage pupils "to be more communicative" and advises that he "abandon his concern for covering the test in favor of illuminating it by asking key questions." These memoranda had been delivered to petitioner when made. Other exhibits included copies of letters delivered to petitioner commenting on his carelessness in keeping records. (Exibits 2 to 6).

Mr. Freund submitted forty-one derogatory memoranda from the file. Some were by Mr. Freund's predecessor, Mr. Reich. These show repeated specific instances of failure to turn in reports or lesson plans, as required by school directives (Exh. 8, pp. 1-2, 6, 7, 22, 23, 24, 29, 30, 32, 34, 36, 38, 40), instances of failure to cover his class and of excessive lateness (Exh. 8, pp. 34-36, 13), and rudeness and lack of respect for other teachers (Exh. 8, pp. 5-8, 27, 31, 33, 26). It would be too cumbersome to describe all of these memos. One example should suffice to indicate their tenor.

A memorandum to petitioner reads (Exh. 8, p. 15):

> "Subject: Parent's Visit.
>
> This morning Mrs. Attanasio came to the school in answer to a request from you. * * * I sent Mr. Mahrer to tell you that the parent was here and to ask you to meet us in the Guidance Office since you were on an unassigned period and you had no class. You failed to appear even though Mr. Mahrer gave you the message. Please let me know the reason. Thank you.
>
> (signed) Ross Wolff."

A memorandum by Mr. Mahrer confirms this (Exh. 8, p. 14). Petitioner's reply (Exh. 8, p. 15):

> "According to my understanding, I am at no one's 'beck and call' during my unassigned period,

> my professional time (*res adjudicata*). If I am consulted beforehand I will be ready for such an interview. I made no request for an interview with Mrs. Attanasio. I told both Anthony [the student] and Mr. Mahrer that I would meet Mrs. Attanasio in 309 where I was completing other professional activities."

Both Mr. Ryan and Mr. Freund, independently, rated petitioner:

> "(2) I hesitate to recommend the applicant for this license."

(3)

Copies of the completed questionnaires were forwarded to the Board and, simultaneously, to petitioner. He had the right and opportunity to discuss them with the principals and with those with whom the principals consulted.

Afterwards, before the appraisal was made, petitioner was given an opportunity to explain, deny or extenuate these evaluations, and to submit any positive ratings and commendations, at a hearing conducted a two-man panel of special assistants to the Board of Examiners.

The panel's detailed report noted that petitioner "did not response to repeated opportunities to offer adequate and concrete explanations to controvert the accuracy of ratings of '2' and '1' in several vital areas of school service," and the report included specific examples where petitioner's responses were irrelevant and not to the point.

The panel noted that petitioner's "record" shows "specific weakness, such as habital lateness in arriving; irresponsibility in making out grades and recording them;

refusal to accept emergency assignment; quibbling over minor matters; failure to follow dismissal regulations; insensibility in dealing with students; lacking respect for his supervisors," and concluded that it "is not one which shows him to have the qualities of leadership, dedication, and dependability excepted of a chairman of department in day high school." The panel made a "recommendation" to the Board:

> "Record unsatisfactory for license as Chairman of an English Department in Day High School."

(4)

Petitioner had the right to appeal directly to the Board of Examiners for reconsideration of the "unsatisfactory" rating, and did so. The Board's report, after a second hearing, noted that petitioner attempted, on that second hearing, to overcome the negative statements only "by citing positive communications regarding his teaching performance." The Board, in rejecting his "lengthy" appeal wrote (Exh. 10):

> "The fact is that in seeking higher license, the applicant must establish a superior record, not merely a satisfactory one. The burden is on the applicant to be able to demonstrate above average performance as a teacher as a part of demonstrating total fitness for a supervisory administrative post.
>
> Thus, [petitioner's] contention . . . that the fact that he was rated satisfactory for regular teaching license, therefore, indicates that he is also satisfactory for chairman of department, is palpably without merit.

The record clearly shows a long history of clashes with authority, refusal to recognize the need for orderly hierarchy in the school system for the benefit of the children, and with all due recognition of the professional rights of teachers. The appeal does not cast any doubt on the over-all judgment of the Board of Examiners."

I

Petitioner was not deprived of procedural or substantive due process. He was given access to all the data upon which the appraisal of his record was made; two opportunities to present rebuttal evidence; a statement of the reasons for the determination; and review in the state courts.

(a)

Petitioner contends he was deprived of "procedural due process" *inter alia* "by the actions of the Board of Examiners in failing to give him advance notice of the reasons for its proposal to rate unsatisfactory his record as a teacher" (Pet., p. 24). This is not in accord with the facts.

The principals forwarded copies to petitioner at the same time that they forwarded them to the Board (Pet., p. 25). Furthermore, he had the opportunity, prior to a hearing, to discuss the evaluations with all the rating officers as he did with Ryan and Nowak.

The principals were also required to furnish petitioner with copies of those materials from his personnel file that were submitted to the Board. Although respondents alleges that they did this too, the petitioner, in a reply, disputes this.

It is not necessary to review such a purely factual dispute. It is conceded that petitioner should have been served copies of these exhibits from his file. If they were not served here, then it was, at most, an isolated, inadvertent, oversight on the part of Mr. Freund and Mr. Ryan, and not a defect in the Board's prescribed procedures. If there was such omission here it was clearly nonprejudicial. Petitioner had seen these exhibits on other occasions. Almost all were memos addressed and delivered to him (with receipt acknowledged in writing), and some were his own responses. Furthermore, as with any teacher, the personnel file was always available to him. Since it appears that at the first hearing, petitioner did present exhibits from his personnel file which were positive (set out in full at Pet., pp. 8-10, 12-16), he must again have had inspected his personnel file prior to the hearing. And if he felt handicapped at the first hearing, and required another opportunity to review this file, he could have asked for an adjournment to do so. He did not. Finally, and undisputedly, he saw these memos again, long before the second hearing, the one before the Board of Examiners. Thus, at best, we have only a factual dispute whether the prescribed procedure was deviated from in one small respect, and no showing at all that this was significant or prejudicial.

This court does not generally grant certiorari to review specific individual factual issues in isolated cases (*U.S.* v. *Johnston,* 268 U.S. 220, 227 [1924]), except where there is a very obvious and exceptional showing of error. (*Berengi* v. *Immigration Director,* 385 U.S. 630, 635 [1966]), See STERN and GRESSMAN, *op cit,* §§ 4.14, 4.18, 3.34; *Waters-Pierce Oil Co.* v. *Texas,* 212 U.S. 86, 97-98 (1909).

(b)

Petitioner contends also that he was denied "procedural due process" by being denied "an opportunity to present evidence under oath at the hearing thereon, and to cross examine witnesses at such hearing", in short, a trial-type hearing (Pet., p. 21 *et seq.*).

The "due process" clause does not invariably require a trial-type hearing in every conceivable case of government impairment of private interest. See *Cafeteria Workers* v. *McElroy,* 367 U.S. 886, 894-895 [1961] (and cases cited therein); *Hannah* v. *Larche,* 363 U.S. 420, 442 (1960). Both cases are cited and quoted, with approval, in *Goldberg* v. *Kelly,* 397 U.S. 254, 263 (1970). See also, *Madera* v. *Bd. of Educ. of City of New York,* 386 F. 2d 778 (2d C., 1967) cert. den. 390 U.S. 1028 (1968); *Woodbury* v. *McKinnon,* 447 F. 2d 839, 844 (5th C., 1971-en banc).

As was said in *Cafeteria Workers, supra* (at 367 U.S. at p. 895): "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation"; and, that "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action". As noted in *Hannah* v. *Larche,* 363 U.S. 420, 442 (1960): "The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding are all considerations which must be taken into account."

Applying these criteria, it is clear that the cases relied on by petitioner are distinguishable. The "right" held to warrant a trial-type hearing there was the right to practice a profession, or employment, with accompany-

ing damage to reputation from an infamous allegation, or something as basic as the right to a bare subsistence. No such "right" is involved here. Secondly, in all the cases cited, there was a narrow issue of fact particularly suitable for adjudication after a trial-type hearing. The "possible burden" (as noted in *Hannah* v. *Larche, supra*) upon the Board here, and in hundreds of similar evaluations of "record", would be overwhelming and impracticable. Here, for instance, there are not only some 40 specific incidents in the "record" but subjective evaluations regarding such matters as sympathetic interest in children, ability to win respect of co-workers and parents, leadership, conscientiousness, tact, ability to take adverse criticism, contribution of ideas at departmental meetings, etc., all subsumed in the term "record," which do not lend themselves to resolution by a trial-type hearing.

Here, due process was satisfied by giving applicants copies of the evaluations and complete access to their personnel files prior to a hearing; then two hearings, one before a panel of the Board and one before the Board itself, at which petitioner had a full opportunity to present rebuttal, explanation, or extenuation, and to submit any positive and favorable material from his personnel file; and, finally, review in the state courts or, alternatively, by the State Commissioner of Education (Educ. Law § 310) of any claim of arbitrariness or illegality.

(c)

Petitioner contends also that he was denied "substantive due process . . . in the sense that Board of Examiners could not make an arbitrary determination . . . contrary to the facts" (Pet., p. 28).

Essentially, this is the same factual argument raised below, there under state law, that the determination was without any evidence and arbitrary (CPLR 7803). It was rejected, on the merits, upon the record, by two state courts, including an unanimous appellate court. And it was then not sought to be reviewed by the State's highest court. (See "Jurisdiction" statement, *supra,* p. 2).

This too is the type of issue of specific facts and limited application that is not generally reviewed by this court, (*U.S.* v. *Johnston,* 268 U. S. 220, 227 [1924]). The fact that it was never raised in the record (nor discussed in any previous appellate brief) as a "substantial due process" claim is, in itself, a jurisdictional bar to its belated presentation now as a "federal question". (*White River Co.* v. *Arkansas,* 279 U.S. 692, 699-700 [1928]).

II

There was an impartial decision maker here. The fact that a two-man panel of special assistants to the Board (who received petitioner's explanation and evidence and made a report and "recommendations" to the Board) were school principals did not disqualify them. Furthermore, it was the Board itself which was the decision maker here; and petitioner had an opportunity, at a second hearing, to present his position fully and directly to the Board.

There is no dispute with the general proposition that procedural due process requires an impartial decision maker. Our position is simply that one was provided here.

Petitioner's argument is that the "panel", since it consisted of school principals, would tend to accept ratings

made by other school principals in preference to an applicant's rebuttal statements. The Board uses special assistants here because of the volume of work; and they, by virtue of their school experience, perform this function more effectively than would strangers to the City's school system. There is no claim that the panel were personal friends of, or were known to, or had even come into professional contact with Mr. Ryan and Mr. Freund, the applicant's present and past supervisor. It is far-fetched to suggest that merely because the panel were school principals (but also were once teachers and applicants for promotions), they could not be impartial. And no request was ever made that they disqualify themselves. Neither of the cases cited by petitioner suggests a basis for disqualification here (assuming *arguendo* the panel were decision makers). Petitioner quotes from *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), for the proposition that even some "prior involvement in some aspect of the case will not necessarily bar [an] . . . official from sitting as a decision maker" so long as he did not "previously participate" in the decision (Pet., p. 32). Neither of the panel members here was in any way involved with petitioner or with the rating officers prior to the hearing.

Moreover, the panel was *not* the decision maker. Its function was only to hear applicant's rebuttal, explanations and other evidence, and to make a report and "recommendation". The decision was made by the Board. Even if petitioner were correct that significant matters were left out of the panel's report to the Board (we submit they were either irrelevant or cumulative) this was no flaw in the procedure. The applicant had the opportunity, at a second hearing, before the Board itself, to present any facts and explanations, and did.

III

Petitioner's contention that the Section 10, subd. 5 of the By-Laws of the Board of Examiners is "unconstitutionally vague" (because it allows for a subjective standard in evaluating an applicant's record) was raised below only, and explicitly, as an issue under state law, and is not a "federal" question within the jurisdiction of this court.

Petitioner contends that the By-Law* is "unconstitutionally vague" because it gives each member of the Board "uncontrolled power to determine, by his own individual standard, whether the applicant has the requisite traits, abilities, and qualities to a degree * * * 'deemed * * * to be necessary or desirable'" (Pet., p. 29).

Petitioner's only argument, in the state courts, proscribing a subjective standard was Article V, Section 6 of the New York Constitution ("Appointments and promotions in the civil service of the state and civil divisions thereof ... shall be made according to merit and fitness to be ascertained, *as far as practicable*, by examination which, *as far as practicable*, shall be competitive; * * *"), and the only case cited, and cited now, is *Matter of Cohen* v. *Fields*, 298 N. Y. 235 (1948), a case applying this New York Constitution "civil service" provision to a *former*

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* By-Law §10, referred to, defines an "unsatisfactory" record:

> "The term 'unsatisfactory' shall mean the applicant is adjudged not fit for the license or position sought, in that he does not possess the traits, abilities, and qualities subsumed under the term 'record' to the degree deemed by the Board of Examiners to be necessary or desirable for the effective performance of the duties pertaining to the license or position sought; * * *"

By-Law, (subsequently replaced). The only argument now raised, on authority of *Cohen,* is that the amended By-Law was "no change in substance". This is no more than an argument that the New York courts have "erred" in applying New York law.

The New York Court of Appeals, in a series of opinions (involving positions in the school system), has held that N.Y. Constitution Article V, §6, does not proscribe subjective judgment in promotional competitive examinations where reliance upon an objective or mechanical standard would be impracticable. *Matter of Sloat* v. *Bd. of Examiners,* 274 N.Y. 367, 373 (1937); *Matter of Nelson* v. *Bd. of Examiners,* 21 NY 2d 408, 416-417 (1968). The "appraisal of record" procedure and the absence of a trial-type hearing were challenged as unconstitutional (subsequent to *Matter of Cohen* v. *Fields,* 298 N.Y. 235 [1948]), and upheld, in cases indistinguishable from the instant one: *Matter of Barnett* v. *Fields,* 301 N.Y. 545 (1950) and *Matter of Diamond* v. *Fields,* 303 N.Y. 776 (1952). The question is now so well settled under New York law that an appeal to the New York Court of Appeals, in the instant case, raising just this constitutional argument, was dismissed as not "substantial" (30 NY 2d 582).

On questions involving the construction of a state Constitution, the decisions of the state's highest court are conclusive. *Paterno* v. *Lyons,* 334 U.S. 314, 319 (1947); *West* v. *Louisiana,* 194 U.S. 258, 261 (1903).

The failure to make this argument in the lower courts as a claimed violation *of the U.S. Constitution* (as distinct from the state Constitution) is enough, in and of itself, to bar petitioner from now raising it in this court. See e.g. *Wilson* v. *Cook,* 327 U.S. 474, 483-484 (1945); *White River Co.* v. *Arkansas,* 279 U.S. 692, 699-700 (1928); *Adler* v. *Bd. of Educ.,* 342 U.S. 485, 496 (1952).

IV

The argument that petitioner's record bears no reasonable relationship to fitness for the supervisory position was not raised below. Nor does it raise a federal question. In any event, a reasonable relationship between the petitioner's record and fitness for the position sought is obvious.

This issue was not raised in any form in any other court —a jurisdictional defect. *Wilson* v. *Cook*, 327 U.S. 474, 485 (1956).

Further, appropriateness of Civil Service examinations for state and local positions is generally a matter of state law. In the three cases cited here by the petitioner, a "federal question" was raised *only* because there was a claim, under the Civil Rights Act of 1964, that the examinations operated to favor one racial group over another. It was this "civil rights" claim that was the basis for "federal" jurisdiction. No such civil rights claim is made here, even now.

Finally, the contention is wholly without merit. The cases cited by petitioner involved question-and-answer examinations allegedly unrelated to the jobs. It does not require "job studies" or argument to establish that personal qualities such as willingness (as distinct from ability) to contribute to curriculum development, conscientiousness in keeping records, punctuality, tact, willingness and ability to get along with fellow teachers, ability to accept criticism and suggestions, etc., (none of which could be established other than by an applicant's prior performance) are all reasonably related to probable success in a sensitive supervisory position in the school system.

CONCLUSION

The petition should be denied.

June 19, 1972.

Respectfully submitted,

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